Wan Noor Kamariah bt Wan Jaafar v Aritah Realty Sdn Bhd & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01(NCVC)(W)-654–11 OF 2018, W-02(NCVC)(W)-2322–11 OF 2018, W-02(NCVC)(W)-2325–11 OF 018, W-02(NCVC)(W)-2347–11 OF 2018 AND W-02(NCVC)(W)-2348–11 OF 2018

KAMALUDIN MD SAID, HADHARIAH SYED ISMAIL AND AHMAD NASFY JJCA

24 JUNE 2021

Land Law — Ownership — Beneficial ownership in dispute — Whether principle of beneficial ownership applicable — Whether there was constructive trust — Whether the sale was void ab initio

Land Law — Indefeasibility of title and interests — Defeating registered interest on ground of fraud or forgery — Whether the appellants pleaded fraud and illegality — Whether fraud and illegality proven — Whether respondents obtained indefeasible title — Whether registration was defective — National Land Code s 340

These were five consolidated appeals concerned with competing ownership claims over a few units of residential and shop lots ('unit lots') erected on a building known as Wisma Aritah. Aritah Realty Sdn Bhd ('Aritah Realty') was the registered proprietor of Wisma Aritah. In the early 1980s to 1990s, Aritah Realty sold the unit lots to the appellants ('the plaintiffs'). Sometime in 2016, the appellants discovered that Aritah Realty had sold and transferred the entire Wisma Aritah included the unit lots purchased by the appellants to Munir & Sons (M) Sdn Bhd ('Munir & Sons'). The master title of the land on which Wisma Aritah stood was currently registered in the name of Munir & Sons and charged to Small Medium Enterprise Development Bank Malaysia Bhd ('SME Bank') as security for the loan granted to Munir & Sons. Aritah Realty contended that the sale of Wisma Aritah to Munir & Sons was without any lawful authority and the result of fraud committed by one of the directors of Aritah Realty, a company secretary of Aritah Realty, and an individual who had no connection whatsoever with Aritah Realty. Aritah Realty then commenced a suit ('Suit 55') at the Kuala Lumpur High Court. In Suit 55, Aritah Realty maintained its position that the sale and transfer of Wisma Aritah was a fraudulent transaction, illegal and void. However, in mid trial, Aritah Realty withdrew Suit 55. On 6 July 2018, the court struck out Suit 55 without liberty to file afresh. To protect their interest in the unit lots, the individual appellants

filed Suit 44, Suit 56 and Suit 82 against Aritah Realty and Munir & Sons. CIMB Bank Bhd ('CIMB') intervened in Suit 44 as the fourth defendant and filed a counterclaim against its three assignors for similar reliefs in Suit 456. The appellants' pleaded case in Suit 44, Suit 56 and Suit 82 was that the sale and transfer of Wisma Aritah to Munir & Sons was tainted with fraud and illegality as Aritah Realty knew the unit lots had already been sold to the appellants. Vide these suits, the appellants sought for, inter alia, a declaratory relief that they were the beneficial owners of the unit lots and that the sale and transfer of Wisma Aritah to Munir & Sons be declared null, void ab intio and illegal. CIMB's pleaded case was that the transaction between Aritah Realty and Munir & Sons and the charge in favour of SME Bank shall not be indefeasible where the registration was obtained by means of an insufficient or void instrument. CIMB claimed for various declaratory orders. Among the reliefs sought was a declaratory order that: (a) CIMB was the absolute assignee for the three assignors; (b) the three assignors were the beneficial owners of the unit lots; and (c) the sale and transfer of Wisma Aritah was illegal and void. On 18 October 2018, the learned judicial commissioner ('JC') dismissed all the appellants claims against Aritah Realty, Munir & Sons and SME Bank with no order as to costs. The learned JC only allowed in part CIMB's claim namely for a declaratory order that CIMB was the absolute assignee and that the loan agreement and deed of assignment was valid and enforceable. The issues that arose on appeal were: (i) whether the learned JC had failed to consider the legal principle of bare trustee and the acquisition of beneficial interest; and (ii) whether the learned JC had erred in his ruling that the issue of fraud and illegality in the sale of Wisma Aritah were discontinued with the discontinuation of Suit 55.

Held, allowing the appeals with RM30,000 costs:

(1) Based on the facts, Aritah Realty must be deemed to have knowledge of the appellants' ownership over the lot units in dispute in these cases. The principle of beneficial ownership applied to the appellants after they had executed the sale and purchase agreement and paid the full purchase price to Aritah Realty. This was an equitable principle aimed to protect innocent purchasers like the appellants who had fulfilled their obligations under the contract. As the beneficial owners, the appellants enjoy the benefits of being the owner of the units even though they had yet to become the registered owner. On the other hand, Aritah Realty as the vendor became a bare trustee under the principle of constructive trust. As a bare trustee, Aritah Realty had no beneficial interest over the unit lots purchased by the appellants. Without any interest whatsoever in the lot units of the appellants, Aritah Realty could not and was not permitted in law to sell or transfer the entire Wisma Aritah based on the principle of *nemo dat quod non habet* (no one gives who possess not). Therefore, the sale and transfer of Wisma Aritah from Aritah Realty to Munir & Sons

was void ab initio as Aritah Realty had no legal capacity to enter into such transactions (see paras 22 & 25–29).

(2) The court agreed with the appellants' submission that the learned JC had erred in law and in fact when the JC ruled: (a) with the discontinuance of Suit 55, the allegation of fraud and illegality in the sale of Wisma Aritah were also discontinued; (b) the fraud or illegality pleaded in Suit 55 were not the pleaded case of the appellants; and (c) the particulars of fraud were not pleaded by the appellants. Fraud and illegality were the pleaded case of the appellants and Aritah Realty and was a live issue to be decided by the court despite the withdrawal of Suit 55. The court found that the learned JC had erred in his ruling that fraud and illegality was no longer an issue. Based on the pleadings and the evidence, the illegality was brought to the notice of the learned JC. However, the learned JC had failed to consider the parties pleaded issues and the evidence on fraud and illegality. Had he done so, he would have come to different conclusions that the sale to Munir & Sons was an illegal contract and a fraudulent transaction, the transfer to Munir & Sons was effected by means of void or insufficient instrumentsand that on the balance of probabilities, fraud and illegality had been proven. It was a fundamental rule of law that a court would not enforce an illegal contract (see paras 30, 34 & 36).

(3) Since the court found that the contract was illegal and Aritah Realty was a bare trustee who had no legal capacity to pass any title or interest, it therefore followed that no title was passed to Munir & Sons. The registration of title into Munir & Sons name was defective under s 340(2)(b) of the National Land Code ('the NLC') and must be set aside. Munir & Sons contention that they had obtained an indefeasible title was misconceived. The court also found that SME Bank was an immediate holder of the charge and not a subsequent holder. As an immediate purchaser, SME Bank could not claim protection under the proviso of s 340(3) of the NLC. SME Bank's charges would have to be set aside (see paras 40–42).

[Bahasa Malaysia summary

Ini adalah lima rayuan gabungan berkaitan tuntutan pemilikan yang bersaing ke atas beberapa unit lot kediaman dan kedai ('unit-unit lot') yang dibina di atas sebuah bangunan yang dikenali sebagai Wisma Aritah. Aritah Realty Sdn Bhd ('Aritah Realty') adalah pemilik berdaftar Wisma Aritah. Pada awal tahun 1980-an hingga 1990-an, Aritah Realty menjual unit-unit lot kepada perayu ('plaintif'). Sekitar tahun 2016, perayu mendapati bahawa Aritah Realty telah menjual dan memindahkan keseluruhan Wisma Aritah termasuk unit-unit lot yang dibeli oleh perayu kepada Munir & Sons (M) Sdn Bhd ('Munir & Sons'). Hak milik asal tanah di mana Wisma Aritah dibina pada masa ini didaftarkan atas nama Munir & Sons dan dicagarkan kepada Small Medium Enterprise Development Bank Malaysia Bhd ('SME Bank') sebagai jaminan bagi

pinjaman yang diberikan kepada Munir & Sons. Aritah Realty berhujah bahawa penjualan Wisma Aritah kepada Munir & Sons tidak sah dan merupakan satu penipuan yang dilakukan oleh salah seorang pengarah Aritah Realty, setiausaha syarikat Aritah Realty, dan individu yang tidak mempunyai kaitan dengan Aritah Realty. Aritah Realty kemudian memulakan tindakan guaman ('Guaman 55') di Mahkamah Tinggi Kuala Lumpur. Di dalam Guaman 55 tersebut, Aritah Realty mengekalkan pendiriannya bahawa penjualan dan pemindahan Wisma Aritah adalah transaksi penipuan, menyalahi undang-undang dan tidak sah. Walau bagaimanapun, pada pertengahan perbicaraan, Aritah Realty menarik balik Guaman 55. Pada 6 Julai 2018, mahkamah telah membatalkan Guaman 55 tanpa kebebasan untuk memfailkan semula. Untuk melindungi kepentingan mereka di dalam unit-unit lot tersebut, perayu memfailkan Guaman 44, Guaman 56 dan Guaman 82 terhadap Aritah Realty dan Munir & Sons. CIMB Bank Bhd ('CIMB') telah mencelah di dalam Guaman 44 selaku defendan keempat dan memfailkan tuntutan balas terhadap tiga penerima serah haknya bagi mendapatkan pelepasan Guaman 456. Perayu memplidkan di dalam Guaman 44, Guaman 56 dan Guaman 82 bahawa penjualan dan pemindahan Wisma Aritah ke Munir & Sons adalah berunsurkan penipuan dan menyalahi undang-undang kerana Aritah Realty mengetahui unit-unit lot tersebut telah dijual kepada perayu. Melalui guaman ini, perayu memohon bahawa, antara lain, satu pengisytiharan bahawa mereka adalah pemilik bermanfaat unit-unit lot tersebut dan bahawa penjualan dan pemindahan Wisma Aritah kepada Munir & Sons adalah batal, ab initio, dan tidak sah. CIMB memohon adalah bahawa transaksi antara Aritah Realty dan Munir & Sons dan cagar yang memihak kepada SME Bank melalui instrumen yang tidak mencukupi atau tidak sah. CIMB telah menuntut pelbagai perintah deklarasi. Antara relif yang dipohon adalah perintah pengisytiharan bahawa: (a) CIMB adalah penerima serah hak mutlak bagi ketiga-tiga penerima serah hak; (b) tiga pemegang serah hak tersebut adalah pemilik berhak unit-unit lot; dan (c) penjualan dan pemindahan Wisma Aritah adalah tidak sah. Pada 18 Oktober 2018, pesuruhjaya kehakiman terpelajar ('PK') menolak semua tuntutan perayu terhadap Aritah Realty, Munir & Sons dan SME Bank tanpa perintah mengenai kos. PK terpelajar hanya dibenarkan dalam sebahagian tuntutan CIMB iaitu untuk perintah pengisytiharan bahawa CIMB adalah penerima serah hak mutlak dan bahawa perjanjian pinjaman dan surat ikatan tugasan adalah sah dan boleh dikuatkuasakan. Isu-isu yang timbul dalam rayuan ini adalah: (i) sama ada PK terpelajar telah gagal untuk mempertimbangkan prinsip undang-undang pemegang amanah dan pemerolehan kepentingan berfaedah; dan (ii) sama ada PK terpelajar telah terkhilaf di dalam keputusannya bahawa isu penipuan dan ketidakesahan undang-undang di dalam penjualan Wisma Aritah yang telah dihentikan dengan pemberhentian Guaman 55.

Diputuskan, membenarkan rayuan-rayuan dengan kos RM30,000:

(1) Berdasarkan fakta, Aritah Realty dianggap mempunyai pengetahuan tentang pemilikan perayu ke atas unit-unit lot yang dipertikaikan di dalam kes ini. Prinsip pemilikan bermanfaat digunakan untuk perayu selepas mereka telah melaksanakan perjanjian jual beli dan membayar harga pembelian penuh kepada Aritah Realty. Ini adalah prinsip ekuiti yang bertujuan untuk melindungi pembeli yang tidak bersalah seperti perayu yang telah memenuhi kewajipan mereka di bawah kontrak. Sebagai pemilik yang berfaedah, perayu menikmati faedah sebagai pemilik unit tersebut walaupun mereka masih belum menjadi pemilik berdaftar. Sebaliknya, Aritah Realty sebagai penjual menjadi pemegang amanah yang terdedah di bawah prinsip amanah konstruktif. Sebagai pemegang amanah, Aritah Realty tidak mempunyai kepentingan yang berfaedah ke atas lot-lot unit yang dibeli oleh perayu. Tanpa apa-apa kepentingan di dalam unit lot perayu, Aritah Realty tidak dibenarkan di dalam undang-undang untuk menjual atau memindahkan keseluruhan Wisma Aritah berdasarkan prinsip *nemo dat quod non habet* (tiada siapa boleh memberi benda yang bukan miliknya'). Oleh itu, penjualan dan pemindahan Wisma Aritah dari Aritah Realty ke Munir & Sons adalah tidak sah kerana Aritah Realty tidak mempunyai hak untuk melakukan transaksi tersebut (lihat perenggan 22 & 25–29).

(2) Mahkamah ini bersetuju dengan hujahan perayu bahawa PK terpelajar telah terkhilaf di dalam undang-undang dan apabila PK memutuskan: (a) dengan pemberhentian Guaman 55, tuduhan penipuan dan menyalahi undang-undang dalam penjualan Wisma Aritah juga dihentikan; (b) penipuan atau menyalahi undang-undang yang memohon dalam Guaman 55 bukanlah kes yang diplidkan; dan (c) butir-butir penipuan tidak diplidkan oleh perayu. Penipuan dan menyalahi undang-undang adalah kes tuntutan perayu dan Aritah Realty dan merupakan isu yang sedang diputuskan oleh mahkamah walaupun penarikan balik Guaman 55 telah dibuat. Mahkamah mendapati bahawa PK terpelajar telah tersalah langkah di dalam keputusannya bahawa penipuan dan menyalahi undang-undang bukan lagi satu isu. Berdasarkan pengakuan dan keterangan di dalam prosiding, ianya telah dibawa ke perhatian PK terpelajar. Walau bagaimanapun, PK terpelajar telah gagal untuk mempertimbangkan pihak-pihak yang memohon isu-isu dan keterangan-keterangan mengenai penipuan dan menyalahi undang-undang. Sekiranya dia berbuat demikian, beliau akan membuat kesimpulan yang berbeza bahawa penjualan kepada Munir & Sons adalah perjanjian yang tidak sah dan transaksi penipuan, pemindahan ke Munir & Sons telah dilaksanakan dengan cara tidak sah atau instrumen yang tidak mencukupi bahawa menurut imbangan kebarangkalian, penipuan dan menyalahi undang-undang telah terbukti. Adalah menjadi asas undang-undang bahawa mahkamah tidak akan menguatkuasakan perjanjian yang tidak sah (lihat perenggan 30, 34 & 36).

(3) Oleh kerana mahkamah mendapati bahawa perjanjian tersebut menyalahi undang-undang dan Aritah Realty adalah pemegang amanah yang tidak mempunyai hak undang-undang untuk meluluskan hak milik atau kepentingan, maka tiada hak pindahan hartanah kepada Munir & Sons. Pendaftaran hak milik kepada nama Munir &Sons telah defektif di bawah s 340(2)(b) Kanun Tanah Negara ('KTN') dan hendaklah diketepikan. Hujahan Munir & Sons bahawa mereka mempunyai hak milik tidak boleh sangkal. Mahkamah juga mendapati bahawa SME Bank adalah pemegang semasa cagaran dan bukan pemegang terkemudian. Sebagai pembeli, SME Bank tidak boleh menuntut perlindungan di bawah peruntukan s 340(3) KTN. Cagaran SME Bank perlu diketepikan (lihat perenggan 40–42).]

Cases referred to

Bank Pertanian Malaysia Bhd (previously known as Bank Pertanian Malaysia) v Nora' rifah bt Darus [2014] 6 MLJ 870, CA (refd)

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, FC (refd)

Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors [2014] 2 MLJ 768; [2014] 1 CLJ 987, FC (folld)

RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal [2016] 1 MLJ 175, FC (refd)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1; [2015] 8 CLJ 944, FC (refd)

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)

Tan Ong Ban v Teoh Kim Heng [2016] 3 MLJ 23, FC (refd)

Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd [2013] 2 MLJ 915, CA (refd)

Legislation referred to

National Land Code s 340, 340(2)(b), (3), Form 14A

Appeal from: Civil Suit Nos WA-21 NCVC-82–09 of 2016, WA-22 NCVC-56–01 of 2017, WA-22 NCVC-44–01 of 2017 and WA-22 NCVC-456–09 of 2017 (High Court, Kuala Lumpur)

Suhaimi bin Kamarudin (Muhamad Khalil with him) (Syamsir Nasrul Khalil & Shahidan) for the appellants.

KY Sim (Mohd Khairi Tarmizi and Tan Chin Seng with him) (KY Sim & Co) for CIMB.

Ahmad Fakhri (Azlan Abd Roni and Nasyrah Ezzan Ali with him) (Roni & Co) for Aritah Realty.

Lancelot Rozario (Vijay Edward with him) (Lancelot Rozario & Co) for Munir & Sons.
Aedyla bin Bokari (Nassir Hafiz Nazri & Rahim) for Small Medium Enterprise Development Bank Malaysia Bhd.

Hadhariah Syed Ismail JCA:

INTRODUCTION

[1] These five appeals is concerned with competing ownership claims over a few units of residential and shop lots (unit lots) erected on 4 1/2 storey building known as Wisma Aritah held under the master title GRN No 76881, Lot 1404 Seksyen 41 (previously held under QTR 753, Lot 1404), Bandar Kampung Bharu, Kuala Lumpur (Wisma Aritah). Aritah Realty Sdn Bhd is the registered proprietor of Wisma Aritah. In the early 1980s to 1990s, Aritah Realty sold the unit lots to the appellants ('the plaintiffs'). Sometimes in 2016, the appellants discovered that Aritah Realty had sold and transferred the entire Wisma Aritah including the unit lots purchased by the appellants to Munir & Sons (M) Sdn Bhd. The master title of the land on which Wisma Aritah stood was currently registered in the name of Munir & Sons (M) Sdn Bhd and charged to Small Medium Enterprise Development Bank Malaysia Bhd as security for the loan granted to Munir & Sons (M) Sdn Bhd.

[2] Aritah Realty contended the sale of Wisma Aritah to Munir & Sons was without any lawful authority and the result of fraud committed by one of the director of Aritah Realty named Zahar bin Ariffin (deceased); company secretary of Aritah Realty named Nurul Farahin bt Md Ambia; and an individual who has no connection whatsoever with Aritah Realty named Norazam bin Tazli.

[3] Aritah Realty then commenced Suit No WA-21 NCVC-55–05 of 2017 ('Suit 55') at the Kuala Lumpur High Court. The plaintiffs in Suit 55 are Abdul Munir bin Ariffin and Aritah Realty. The defendants are: the representative of Zahar bin Ariffin (deceased) as the first defendant; Nurul Farahin bt Md Ambia as the second defendant; Munir & Sons as the third defendant; Pengarah Tanah dan Galian Kuala Lumpur as the fourth defendant; and Mass Rapid Transit Corporation Sdn Bhd as the fifth defendant. The fourth and fifth defendants were removed as parties before the trial. In Suit 55, Aritah Realty maintained its position that the sale and transfer of Wisma Aritah was a fraudulent transaction, illegal and void.

[4] However, in mid trial, Aritah Realty withdrew Suit 55. On 6 July 2018, the court struck out Suit 55 without liberty to file afresh.

[5] To protect their interest in the unit lots, the individual appellants filed Suit 44, Suit 56 and Suit 82 against Aritah Realty and Munir & Sons. CIMB intervened in Suit 44 as the fourth defendant. CIMB filed a counterclaims against its three assignors (Azmillah bt Rosman, Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd) for similar reliefs in Suit 456. The appellants' pleaded case in Suit 44, Suit 56 and Suit 82 was the sale and transfer of Wisma Aritah to Munir & Sons is tainted with fraud and illegality as Aritah Realty knew the unit lots had already been sold to the appellants. Vide these suits, the appellants sought for, inter alia, a declaratory relief that they are the beneficial owners of the unit lots and that the sale and transfer of Wisma Aritah to Munir & Sons be declared null, void ab intio and illegal.

[6] Likewise, to enforce its right as an absolute assignee in the sale and purchase agreement involving appellants named Azmillah bt Rosman, Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd ('the assignors'), CIMB brought Suit 456 against these three appellants, Aritah Realty, Munir & Sons and Small Medium Enterprise Development Bank Bhd. CIMB's pleaded case was the transaction between Aritah Realty and Munir & Sons and the charge in favour of SME Bank shall not be indefeasible where the registration was obtained by means of an insufficient or void instruments. CIMB claims for various declaratory orders. Among the reliefs sought is a declaratory order that CIMB is the absolute assignee for the three assignors; that the three assignors are the beneficial owners of the unit lots and a declaration that the sale and transfer of Wisma Aritah is illegal and void.

[7] On 18 October 2018, the learned judicial commissioner (now JCA) dismissed all the appellants claims against Aritah Realty, Munir & Sons Sdn Bhd and Small Medium Enterprise Development Bank Malaysia Bhd with no order as to costs. The learned JC only allowed in part CIMB's claim namely for a declaratory order that CIMB is the absolute assignee for Azmillah bt Rosman; Azmin Kass bin Rosman and Melati Perspektif Sdn Bhd and that the loan agreement and deed of assignment is valid and enforceable.

[8] For ease of reference, in this judgment we shall refer the parties as follows:

(a) the appellants as the appellants or CIMB interchangeably whenever appropriate;

(b) Aritah Realty Sdn Bhd as Aritah Realty;

(c) Munir & Sons (M) Sdn Bhd as Munir & Sons; and

(d) Small Medium Enterprise Development Bank Malaysia Bhd as SME Bank.

BACKGROUND FACTS

[9] Sometimes in 1981, Aritah Realty as the land owner held under the Master Title together with a developer known as Pembangunan Bukit Kuda (M) Sdn Bhd erected a four and half (4 1/2) storey building known as Wisma Aritah comprising of forty units of individual parcels namely eight units of shoplots, eight units office lots and 24 units of flat lots with common facilities.

[10] Almost all the individual appellants took a loan from various bank to finance the purchase of their unit lot. Some of them purchased directly from Aritah Realty. Some bought their unit through public auction. Since these purchases happens in the early 1990s, more than 20 years ago, most of the purchasers have fully settled the purchase price.

[11] However, the developer, Pembangunan Bukit Kuda (M) Sdn Bhd failed to apply for strata title for the individual unit. Even though all the residential units and shop lots have been sold, all the units are still under a Master Title. Pembangunan Bukit Kuda (M) Sdn Bhd was wound up.

[12] On 10 June 2016, the appellants had a rude shock when Munir & Sons executed a writ of distress over the entire units in Wisma Aritah purportedly to recover outstanding rental in the sum of RM840,000 allegedly owed by Aritah Realty to Munir & Sons. The appellants were instructed to vacate their unit lots on 15 June 2016.

[13] Aritah Realty then conducted a land search and the search showed that the Master Title had been transferred by Aritah Realty to Munir & Sons on 2 July 2014. The Master Title was subsequently charged to SME Bank on 2 July 2014.

[14] In June 2016, Aritah Realty was informed that the land is being acquired by Mass Rapid Transit Corp Sdn Bhd through a government *gazette* dated 7 April 2016 for the purpose of developing a light rail transit project through the land and that owners of the land will be compensated.

[15] Due to the ownership dispute, the award of compensation has been deposited in court.

[16] Aritah Realty's defence was that the sale and transfer of Wisma Aritah to Munir & Sons was tainted with fraud and/or effected without lawful authority.

[17] Munir & Sons' defence to all the suits can be summarised as follows. They had conducted a land search which show Aritah Realty is the registered

owner and the land was unencumbered. They also conducted a physical search at Wisma Aritah and found the building was tenanted. They proceeded to sign a sale and purchase agreement dated 20 September 2013 with Aritah Realty to purchase Wisma Aritah at the agreed price of RM11m. After the purchase of Wisma Aritah, it was rented to Aritah Realty for a rental of RM70,000 per month. A tenancy agreement dated 26 August 2014 was allegedly signed between Aritah Realty and Munir & Sons. Thus, Munir & Sons took the position that it was a bona fide purchaser for value having purchased it for a total consideration of RM11m. Munir & Sons contended that its purchase of Wisma Aritah was without notice of any fraudulent conduct or lack of authority and the title it obtained from Aritah Realty was indefeasible by reason of s 340 of the National Land Code.

[18] SME Bank's defence was that its dealing with Munir & Sons was done carefully by taking the following steps: depositing the original title of the property with SME Bank's lawyer; conducting a land search which shows the land is unencumbered and obtaining a confirmation from Aritah Realty that it had not entered into any agreement to sell the property with any third party. Thus, SME Bank contended it had acted bona fide for valuable consideration.

THE HIGH COURT JUDGMENT

[19] Based on the grounds of judgment, the learned judicial commissioner ('JC') has decided as follows:

(a) with the discontinuance of Suit 55, the allegation of fraud and illegality in the sale of Wisma Aritah were also discontinued;

(b) without the issuance of strata titles, the unit purchasers shall only have the rights of ex contract which is in the form of chose in action;

(c) without an assignment of rights and benefits in the contract with Aritah Realty and the developer, the rights to the benefit of Aritah Realty's and the developer's obligation thereunder would not be passed down to the unit purchasers. Hence, there cannot exist any rights to any existing property. All that exists, without the strata title being issued, are rights in contract;

(d) the unit purchasers cannot be regarded as beneficial owners of Wisma Aritah. They did not contract to buy Wisma Aritah or the land upon which it sits. What the purchasers contracted for were ownership of units in Wisma Aritah and ownership of such units may only be achieved when title ie strata title were issued to them. Having regard to the decision of *Tan Ong Ban*, that without any title to the units purchased, the plaintiffs have no registrable interest under the National Land Code;

(e) the concept of bare trustee and the acquisition of beneficial interest can only arise if there is existence a registrable interest capable of transferred; and

(f) the unit purchasers could have terminated their respective sale and purchase agreement with Aritah Realty anad the developer (either as assignee or original contracting parties) for their breach in not applying for and securing strata title.

GROUNDS OF APPEAL

[20] The appellants raised two main grounds of appeal as follows:

(a) the learned JC had failed to consider the legal principle of bare trustee and the acquisition of beneficial interest; and

(b) the learned JC had erred in his ruling that the issue of fraud and illegality in the sale of Wisma Aritah were discontinued with the discontinuation of Suit 55.

OUR DECISION

[21] It is settled law that an appellate court can intervene with the finding of facts by a trial judge when the finding are grounded entirely on speculations, surmises or conjecture; when an inference made by a trial court from its factual findings is plainly wrong, absurd or illogical; where there is none or insufficient judicial appreciation of evidence; when the findings of a trial court run contrary to the admission of the parties to the case, or fail to notice certain relevant facts which if properly considered, will justify a different conclusion; when the findings of facts are premised on the absence of evidence, or are contradicted by the evidence on record (see *Bank Pertanian Malaysia Bhd (previously known as Bank Pertanian Malaysia) v Nora' rifah bt Darus* [2014] 6 MLJ 870).

[22] Reverting to the present case. The facts revealed Aritah Realty never disputed it had sold the unit lots to the appellants. Aritah Realty also did not dispute they have executed the deed of assignment in favour of CIMB. Aritah Realty also never raised the issues that these appellants have not paid the full purchase price for the said lot units. Nevertheless, CIMB confirmed its borrowers have fully settled the purchase price to Aritah Realty. Based on the facts, Aritah Realty must be deemed to have knowledge of the appellants' ownership over the lot units in dispute in these cases.

[23] Based on the above,CIMB and the appellants submitted they were the beneficial owners of the lot units and Aritah Realty hold those lot units as trustee on behalf of the appellants and CIMB. However, the learned JC held

the concept of bare trustee and acquisition of beneficial interest does not apply because the appellants do not have a strata title. The learned JC also held the appellants' sole remedy is to sue the vendor under the terms in the sale and purchase agreement. The appellants submitted the learned JC had erred in law and in fact in failing to consider the principle of bare trustee and acquisition of beneficial interest as decided in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12 where the Federal Court held:

> The contractual events which result in the vendor becoming a bare trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed , valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

[24] In *Tan Ong Ban v Teoh Kim Heng* [2016] 3 MLJ 23, the Federal Court held:

> The principle of beneficial ownership differentiate between the rights of a purchaser of a property who has fully settled the purchase price with one who has not. This principle clothes a purchaser who has settled the full purchase price with a distinct privilege equivalent to a legal owner, although he or she has yet to be registered as the proprietor of the property.

[25] We agree with the appellants' submission. The principle of beneficial ownership applies to the appellants after they have executed the sale and purchase agreement and paid the full purchase price to Aritah Realty. This is an equitable principle aimed to protect innocent purchasers like the appellants who had fulfilled their obligations under the contract. As the beneficial owners, the appellants enjoy the benefits of being the owner of the units even though they have yet to become the registered owner.

[26] On the other hand, Aritah Realty as the vendor becomes a bare trustee under the principle of constructive trust. In *RHB Bank Bhd v Travelsight (M) Sdn Bhd & Ors and another appeal* [2016] 1 MLJ 175, the Federal Court held:

> A constructive trust arises whenever the circumstances are such that it would be unconscionable of the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another ...

[27] As a bare trustee, Aritah Realty had no beneficial interest over the unit lots purchased by the appellants. At this juncture, it is instructive to refer to the case of *Temenggong Securities Ltd & Anor v Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45, where the Federal Court held:

> the vendors having parted with their interest in the lands to the appellants were bare trustees and had no interest in the land over which a valid caveat could be lodged.

[28] Without having any interest whatsoever in the lot units of the appellants, Aritah Realty could not and is not permitted in law to sell or transfer the entire Wisma Aritah based on the principle of *nemo dat quod non habet* (no one gives who possess not). In *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1; [2015] 8 CLJ 944 Federal Court held:

> The Court of Appeal was right in finding that MPM, after having entered In the sale and purchase agreements with the earlier purchasers and received the full payments of the purchase price, had become a bare trustee and as such was not permitted to deal with the lots. We are in agreement with the Court of Appeal that the subsequent sales, transfers or conveyances of the lots by MPM to the new purchasers (including the appellant) were void ab initio, as MPM did not have any legal or requisite capacity to enter into such agreements.

[29] The facts in these appeals is similar to *Samuel Naik*'s case. Therefore, by way of analogy, the appellants rightly submitted before us that the sale and transfer of Wisma Aritah from Aritah Realty to Munir & Sons is void ab initio as Aritah Realty had no legal capacity to enter into such transactions.

[30] With regard to the issue of fraud and illegality in the sale transactions, the appellants submitted that the learned JC had erred in law and in fact when he ruled: (a) with the discontinuance of Suit 55, the allegation of fraud and illegality in the sale of Wisma Aritah were also discontinued; (b) the fraud or illegality pleaded in Suit 55 were not the pleaded case of the appellants; and (c) the particulars of fraud were not pleaded by the appellants. We agree with the appellants. Our reasons are as follows:

(a) after perusing the appeal records, we find the particulars of fraud pleaded in Suit 55 were also the same as the particulars of fraud pleaded by Aritah Realty in its statement of defence to Suits 44, 56 and 82. This fact is admitted by the learned JC in para 66 of his judgment;

(b) the particulars of fraud pleaded by Aritah Realty in paras 13 and 40 of its defence reads as follows:

> 13. Justeru itu, defendan pertama menegaskan dengan kukuh disini bahawa, perbuatan-perbuatan defendan kedua tersebut adalah satu perbuatan yang salah, berniat serong, bertentangan dengan hak ketuanpunyaan, satu perbuatan menipu dan memperdayakan bukan sahaja defendan pertama, malah pemilik-pemilik unit yang telah dibeli oleh orang ramai atas pengataan-pengataan bahawa:-
>
> (a) Pindahmilik hartanah tersebut kepada defendan kedua telah dilakukan secara frod, konspirasi dan kini ketuanpunyaan adalah disangkal dan dicabar.
>
> (b) Instrumen pindahmilik iaitu borang 14A yang dimajukan kepada Pejabat Tanah dan Galian, Kuala Lumpur adalah cacat, batal dan tidak sah atas alasan-alasan berikut:

(i) Menurut rekod defendan pertama, tidak pernah sebarang resolusi syarikat ada dan pernah diluluskan untuk penjualan hartanah tersebut;

(ii) Menurut rekod defendan pertama, tidak pernah sebarang resolusi syarikat ada diluluskan memberi kuasa atau otoriti kepada mana-mana pihak untuk menandatangani sebarang instrument Pejabat Tanah bagi pihak defendan pertama;

(iii) Menurut rekod defendan pertama juga, tidak pernah wujud sebarang perjanjian jualbeli yang sahih menjurus kepada penjualan hartanah tersebut;

(iv) Borang pindahmilik tanah tersebut telah ditandatangan dan terdapat meteri syarikat defendan pertama yang telah digunakan tanpa kelulusan dan digunakan dengan niat menipu dan frod; dan

(v) Tiada sebarang balasan bernilai pernah wujud diberikan oleh defendan kedua kepada pemilik sebenar iaitu defendan pertama.

(c) Sebuah bangunan komersil yang didirikan di atas hartanah milik defendan pertama telah dijual lot-lot kediaman dan lot-lot kedai kepada pembeli-pembeli.

(d) Bangunan Wisma Aritah tersebut bukanlah milik defendan kedua, bahkan ianya milik pembeli-pembeli dan sebahagiannya dimiliki juga oleh defendan pertama.

40. Defendan pertama menegaskan bahawa ia tidak pernah meluluskan resolusi-resolusi tersebut dan tidak pernah bersetuju untuk menjual hartanah tersebut kepada mana-mana pihak berdasarkan pengataan-pengataan di bawah:

(c) Salah seorang pengarah defendan pertama iaitu Abdul Munir bin Ariffin tidak pernah menandatangani resolusi-resolusi tersebut dan tiada sebarang pengetahuan mengenai kewujudan resolusi-resolusi tersebut sehinggalah pihak defendan kedua mengeksibitkan resolusi-resolusi tersebut dalam Affidavit Jawapan defendan kedua bertarikh 7.6.2017;

(d) Aritah Realty Sdn Bhd Shareholders' Circular Resolution telah ditandatangani oleh Norazam bin Tazli yang pada masa material adalah bukan pemegang saham, pengarah mahupun diberi kuasa oleh defendan pertama dan/atau Lembaga Pengarah defendan pertama untuk mewakili defendan pertama; dan

(e) Nurul Farahin binti Md Ambia telah menurunkan tandatangan dan cop salinan diakui sah pada resolusi-resolusi tersebut walaupun resolusi-resolusi tersebut tidak pernah diakui, diluluskan mahupun dipersetujui dan merupakan satu penghasilan dokumen palsu dan berbentuk frod.

[31] Under Suit 456, Aritah Realty had filed and issued a third party notice against the third party namely Zahar bin Ariffin, Nurul Farahin bt Md Ambia and Norazam bin Tazli where Aritah Realty alleged that Aritah Realty was the victim with the act of fraud, cheating and deceiving done by Munir & Sons and third party.

[32] The third party failed to enter appearance against the third party notice issued by Aritah Realty and failed to appear before the High Court to defend themselves.

[33] Fraud were also pleaded by the appellants in Suit 44, Suit 56 and Suit 82. Even though it is true that the fraud pleaded by the appellants is not similar to the fraud alleged by Aritah Realty and not particularised, in our view this differences does not mean the 'fraud' pleaded by the appellants carried no weight or no meaning at all. The appellants' case is simply this. Despite Aritah Realty knew the appellants were the beneficial owners of the unit lots and common sense dictate that Aritah Realty cannot sell the same unit lots for the second time (after the lapse of 20 years), yet Aritah Realty sold Wisma Aritah to Munir & Sons. To aggravate matters, the sale was carried out without the appellants' knowledge. So, this is the 'fraud' meant by the appellants. Therefore, it is impossible for the appellants to give particulars of fraud. The appellants can only plead facts which they have personal knowledge. On the other hand, Aritah Realty who claims the instruments to effect the sale were a forgery had to give the particulars so that the court and all the parties had a clear picture and understanding. It is our considered view that as a result of the learned JC's failure to appreciate the evidence, he had come to a wrong conclusion.

[34] Based on the above, it is clear as day follow night that fraud and illegality were the pleaded case of the appellants and Aritah Realty and is a live issue to be decided by the court despite the withdrawal of Suit 55. We, therefore find the learned JC had erred in his ruling that fraud and illegality is no longer an issue.

[35] At the trial, one of Aritah Realty's director, En Abdul Munir bin Ariffin testified that:

(a) there is no sale and purchase agreement between Aritah Realty and Munir & Sons as there is no resolution from the Board of Directors of Aritah Realty approving the sale;

(b) the transfer form (Form 14A) was signed by Zahar bin Ariffin and Nurul Farahin bt Md Ambia and Aritah Realty's company seal was used without authorisation;

(c) there was no valuable consideration ever given by Munir & Sons to Aritah Realty;

(d) there was no company resolution approving any power of attorney authorising any party to give out signature on any instrument of land office on behalf of Aritah Realty;

(e) Aritah Realty never applied for a new land title for Lot 1404. Instead, the new land title was applied for and obtained by Norazam bin Tazli, who is not a shareholder or director in Aritah Realty; and

(f) he lodged a police report soon after he discovered the fraud.

[36] Based on the pleadings and the evidence, we had no doubt in our mind that illegality was brought to the notice of the learned JC. However, we find the learned JC had failed to consider the parties pleaded issues and the evidence on fraud and illegality. Had he done so, he would have come to a different conclusions that is the sale to Munir & Sons is an illegal contract and a fraudulent transaction. That the transfer to Munir & Sons were effected by means of void or insufficient intruments. That on the balance of probabilities, fraud and illegality has been proven. It is a fundamental rule of law that a court will not enforce an illegal contract. In *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21, the Federal Court said:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

[37] However, in its submission before the High Court and before us, Aritah Realty had taken a different position as to what they have pleaded in its defence particularly in paras 55–56 of Aritah Realty's written submission where it was submitted that Aritah Realty had acknowledged receipt of a deposit sum of RM1.1m and a further sum of RM1.9m from Munir & Sons. In *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915, the court held:

> The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. The respondent is estopped from taking a position different from that pleaded in its defence in the earlier suit.

[38] We trust learned counsels for Aritah Realty are well aware of the fundamental rule of law that parties are bound by their pleadings. We therefore hold Aritah Realty is estopped from taking a different position from their pleaded defence.

[39] In a case where fraud and illegality has been made out, the next issue for us to consider is whether Munir & Sons had obtained an indefeasible title under s 340 of the National Land Code ('the NLC') which provides as follows:

> 340 Registration to confer indefeasible title or interest, except in certain circumstances
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible —
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body,was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) —
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.
>
> (4) Nothing in this section shall prejudice or prevent —
>
> (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or
>
> (b) the determination of any title or interest by operation of law.

[40] Since we have found that the contract is illegal and Aritah Realty is a bare trustee who had no legal capacity to pass any title or interest, it therefore follows that no title is passed to Munir & Sons. The registration of title into Munir & Sons' name was defective under s 340(2)(b) of the NLC and must be set aside. Munir & Sons' contention that they had obtained an indefeasible title is misconceived.

[41] We now deal with SME Bank's charges. SME Bank contended they are a subsequent acquirer of title and a bona fide purchaser. They claimed to have an indefeasible title and rely on the proviso to s 340(3) of the NLC. Therefore, SME Bank submitted the charges must remain. We disagree. It is an undisputed fact that the registration of transfer and the registration of the charges took place concurrently on 2 July 2014, time 2:52:47 pm. Therefore, we find SME Bank is an immediate holder of the charge and not a subsequent holder. As an immediate purchaser, SME Bank cannot claim protection under the proviso to s 340(3) of the NLC. We refer to the case of *Kamarulzaman bin Omar & Ors v Yakub bin Husin & Ors* [2014] 2 MLJ 768; [2014] 1 CLJ 987, where the Federal Court held:

> Whenever a registered title or interest is sought to be set aside under s 340 of the NLC, trial courts should first ascertain whether the title or interest under challenge is registered in the name of an immediate purchaser or a subsequent purchaser. If it is the former, the bona fides of the immediate purchaser will not offer a shield of indefeasibility and his title is liable to be set aside if any of the vitiating elements set out in s 340(2) of the NLC has been made out. If it is the latter, those vitiating elements would not affect the title or interest, provided the title or interest is acquired by the subsequent purchaser in good faith and for valuable consideration.

[42] Based on *Kamarulzaman*'s case, SME Bank's charges will have to be set aside.

[43] For the aforesaid reasons, we find there is merit in the appeals. We were satisfied that there was insufficient judicial appreciation of the pleadings by the learned JC that warrant this court's intervention. We therefore allowed the appeals. We set aside the decision of the learned JC and substituted therewith with judgment entered for the appellants in Suit 44, Suit 56, Suit 82 and Suit 456. We also ordered each respondent to pay cost of RM30,000 to the appellants.

Appeals allowed with costs of RM30,000.

Reported by Muhamad Azham Marwan